A PROBLEM IN THE DRAFTING OF WORKMEN'S COMPENSATION ACTS.

[I. — *Concluded.*]

THE purpose of these acts being to compensate workmen for industrial accidents and not to insure workmen against want, it is evident that the employer is not bound to compensate the workman for his loss of earning power unless such loss be caused by the employment. The causal connection between the injury and the employment is the subject of two phrases in section 1 of both the English acts. A workman is entitled to compensation if "personal injury . . . arising out of his employment . . . is caused" to him. The words "is caused" are taken to relate to the connection between the accident and the harm suffered by the workman. The words "arising out of" point to the origin or cause of the accident, and are descriptive of its character or quality. They relate to the connection between the employment and the accident, the injury-producing occurrence.

Even admitting that the accident arose out of the employment, the master is only liable if the accident, and to the extent to which the accident, incapacitates the servant. All the cases in which the phrase "is caused" is considered, deal with this question. If the accident is regarded as "arising out of the employment," it is consistently held that in determining whether the physical incapacity which deprives the servant of his earning power is caused thereby to the workman, it is not relevant to say that it was not the natural or probable consequence of the accident or occurrence. The employer is bound to compensate the servant for all the results of the accident, however unexpected their extent; it is immaterial that such an accident or occurrence would not normally incapacitate the ordinary workman, or that such an accident would not, save under the most exceptional circumstances, result in any physical disability. The question whether the physical disability, the incapacity to labor, is caused by the accident, or "where death results, the question whether it results from the injury, resolves itself into an inquiry, into the chain of causation." It is

enough that the accident is one of the necessary antecedents of the disability of which the plaintiff complains. The causal connection depends upon the actual sequence of events, their relation of fact to fact as facts. The test is purely objective and external. If the compensation is to be restricted, if the employer is to be relieved from the liability for any of the injuries of which the workmen's employment is the *causa sine qua non*, the restriction, the relief, must be found in that other phrase which is also held to relate to causation — "arising out of the employment." While an injury is held to be "caused" by an accident if the accident is a *causa sine qua non*, a necessary antecedent of the injury, it is not enough that but for the employment the accident would not have occurred, that the employment is a *causa sine qua non*, a necessary antecedent, of the accident. Something more is required if the injury is to be held to be one arising out of the employment.

Now this phrase is susceptible of at least two totally different and antagonistic meanings: It may be understood to mean that the injury in fact arose from the employment, that it in fact happened because the servant was employed as he was, and that but for the employment it would not have occurred; it might even be taken to mean that it arose wholly out of the employment, that no cause connected and no force not itself originating in the employment had been a necessary factor in producing the injury. In either event such a meaning is also objective and external, it deals with facts as facts and with the actual relation of one fact with another. But, on the other hand, it is capable of being understood in a sense which has nothing to do with the actual relation of the employment to the harm, but rather to these relations considered as a subject of someone's thoughts and anticipations.

At one time there was a marked tendency to limit the liability of one guilty of tortious conduct, at least where his tort was one of negligent action or omission, to those consequences which he ought to have foreseen as likely to result therefrom.[1] The liability was made to depend upon the probability that the harm which in fact resulted would occur.[2] The test of legal cause was subjective, not

[1] See the recent articles by the Hon. Jeremiah Smith on Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 223, especially 114–128.

[2] As has been well said, "probability is not an attribute of events in themselves,

objective. This conception of legal as distinguished from actual cause, while disappearing, still occasionally crops up even in tort actions.[3]

While, in determining whether the workmen's incapacity is "caused" by the accident, the test is purely objective and both the master's and the sufferer's power of foreseeing it is immaterial—, the test applied to determine whether the accident arose out of the employment has become purely subjective. An accident, and so the injury resulting from it, is held to "arise out of the employment" only if it is due to a risk to which, at the time the employment begins, or a particular task is set the employee, it could be foreseen that the employment or task would probably subject him.

"It is not enough for the applicant to say the accident would not have happened if I had not been engaged in this employment or if I had not been in that particular place." [4]

The first step in this direction was taken in the Scottish case of Falconer *v.* London & Glasgow Engineering Co.,[5] where a workman was injured by the larking of a fellow servant, in which Lord Traynor holds that the injury did not arise out of the employment "because it could not be said to be incidental to the employer's business or one of the hazards attached to it. It might equally have happened in any work." It first appears in England in Armitage *v.* L. & Y. Ry. Co.,[6] a case whose facts were closely similar

---

but of our expectation of them; it is subjective not objective, it is the name for somebody's guess whether they will happen." Terry, Leading Principles of Anglo-American Law, § 547.

[3] See 25 HARV. L. REV. 237–252, especially 251, 252.

[4] Cozens-Hardy, M. R., in Craske *v.* Wigan, [1909] 2 K. B. 635, 638.

[5] 3 Fraser 564 (Scot. Ct. Sess., 1901).

[6] [1902] 2 K. B. 178, 4 W. C. C. 5. "The accident," says Collins, M. R., "did not arise from anything which by any stretch of language can be properly said to be incidental to the employment of either of the boys. It was as much outside the scope of the one to do the act which caused the injury as it was outside the scope of the employment of the other to be exposed to such an injury." And Cozens-Hardy, L. J., says: "Some meaning must be given to the words 'out of.' . . . They appear to point to accidents arising from such causes as the negligence of fellow workmen or some natural cause incident to the character of the business." In Andrew *v.* Failsworth Industrial Society, [1904] 2 K. B. 32, Collins, M. R., adopts the following language of the County Court judge: "But if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that that extra danger to

to those in Falconer's case, and is definitely and authoritatively announced with a slight but significant variation in Challis *v.* London & S. W. Ry.[7]

"The legislature," says Collins, M. R., "in framing the Act, intended to provide for the risks of accident which are within the ordinary scope of the particular employment in which the workman is engaged. No doubt the Act does not use the expression 'risks incidental to the employment,' but the interpretation of the words 'accident arising out of and in the course of the employment' appears to me necessarily to involve the question what risks are commonly incidental to the employment." [8]

It must be remembered that the Act of 1897 was limited to certain trades and employments which may be fairly called ultra-hazardous. In Falconer *v.* London & Glasgow Engineering Co., the first case in which it was held that no injuries arose out of the employment unless they were due to a risk incidental thereto, it is expressly pointed out by Macdonald, Lord President, that "the object of the statute was to secure compensation to workmen who are engaged in occupations which exposed them to dangers from which other occupations were free" and that it "was as against accidents incidental to the employment that the benefit of the statute was given."

"The purpose of the Acts," says Lord Trayner in the same case, "appears to have been to lay upon certain employers, the execution of whose work and business was more than ordinarily hazardous and from the nature of it more than usually attended with accidental injuries to their servants, the liability from which the employers of labor in other and less hazardous employments, were exempt, and even then only to impose the liability for incidental injuries which arose out of and in the course of the hazardous employment."

---

which the man is exposed is something arising out of the employment, and if in consequence of that a fatality occurs, I am entitled to say the section applies and the applicant is entitled to recover."

[7] [1905] 2 K. B. 154, 7 W. C. C. 23. An engine driver was injured by stones thrown by boys from a bridge over the line; the boys did not intend to strike the driver, their object apparently being to throw the stones down the smoke stack.

[8] [1905] 2 K. B. 157. Cozens-Hardy, L. J., at p. 159, uses the word "reasonably" instead of "commonly" incidental, and the one holds it to be unjustifiable, and the other thinks it would be "absurd," to leave out of sight or disregard "what is matter of common knowledge and experience," the fact "that a train in motion has great attraction for mischievous boys as an object at which to discharge missiles." Collins, M. R., at p. 157.

And he gives instances of accidents occurring to workmen while employed, which in his opinion would not arise out of it because they "are in no sense incidental to such employment and might equally happen to workmen engaged in employments which are not within the employments enumerated in the statute."

There is much to be said in favor of so construing such words in such an act. If the object is to make employers who choose to engage in ultra-hazardous businesses answer for the injury caused to their employees by the exceptional nature of their business, there seems no good reason to hold them answerable for injuries due not to those exceptional risks but to risks which would attach to any workman working in any business. On the other hand, there seems no particular justice in giving compensation to one workman because he is employed in a business which subjects him to peculiar dangers which have in fact not injured him, and to deny it to another injured in precisely the same way simply because, while his employment did subject him to the risk of the very nature from which he suffered, it did not also subject him to peculiar risks of a totally different sort, thereby becoming ultra-hazardous. If the act singles out servants in certain trades, because of the peculiar risks to which these trades subject them, as worthy of protection not granted other servants in less hazardous employments, it would seem a fair construction of the legislative intent that they were intended to be protected not from the risks which they ran as working men and to which all workmen in any employment are subject, but only from those risks which were peculiar to their exceptional employment.

In the earlier cases and even in Challis *v.* L. & S. W. Ry., while the test is subjective, it is not subjective to either the master or the workman. The question was whether the accident arose from some danger found by experience to be so commonly attendant upon the particular employment as to be recognized as forming one of the extra hazards of it and so intended by Parliament to be covered by the act. What either the master or workman either did or could have anticipated is regarded as unimportant. The test, while subjective, is subjective to the intent of Parliament, not to the employer and employee.

The Act of 1906, however, extended the liability of the employers and the right of compensation of the workmen to all employments

irrespective of any peculiar dangers incident thereto. The object of such an act, therefore, is not to protect workmen from peculiar risks incidental to the peculiar nature of their employment, but to protect workmen as a class from an injury received in consequence of their labor, because they are regarded as incapable of bearing such loss without injury to society. A restriction of liability and of the right to compensation to those injuries which are peculiar to the nature of the particular employment on which the workman is engaged is as much out of place in such an act as it is appropriate in an act restricting liability and the right to compensation to ultra-hazardous employments.

In construing the Act of 1906, the courts have, however, consistently held that the injury to arise out of the employment "must arise out of a risk commonly incident to the employment," [9] or, to phrase it somewhat differently, "from a risk to which the workman was exposed by the nature of his employment." [10]

The test remained subjective and inevitably became subjective to the parties to the employment, the employer and the employee. Their foresight, sometimes that of the servants and sometimes that of the masters, sometimes that of both, becomes the test.[11] So in Morrison *v.* Clyde Navigation Trustees,[12] Lord M'Laren says:

[9] Buckley, L. J., in Fitzgerald *v.* Clarke & Son, [1908] 2 K. B. 799.

[10] Lord Kinnear in McLauchlan *v.* Anderson, 48 Scot. L. Rep. 349, 351 (1911).

[11] So long as there is someone else whose state of mind is important, the requirement that the risk must be commonly incidental to the employment does not necessarily indicate that the test is subjective to the parties to the contract of employment. So long as the operation of the act is restricted, as was that of 1897, to ultra-hazardous trades, what dangers were usually incidental to such an employment was important in determining whether the risk was one which was intended to be covered by the act. When, however, the act is made applicable to all employments, as is that of 1906, the workman is protected not because he is exposed to peculiar dangers different from those of other workmen in other employments, but because as workman he is unable to care adequately for the loss resulting to him from accidents which he receives in his service. It at once becomes unimportant whether the particular sort of injury or the particular cause of it could have been foreseen; the loss is there, and all that is necessary is that it should be due to his employment. If, then, in construing the act of 1906, this requirement that the injury should be from a risk incidental to the accident is regarded as an essential part of the interpretation of the phrase "arising out of the employment," it naturally follows that the intent of the legislature to include this injury because peculiarly apt to occur in a particular sort of employment being no longer important, the foresight of someone other than the public speaking through its representatives should be made the test, and it is equally natural that the foresight should be that of either or both of the parties concerned, the employee and the employer.

[12] [1909] Scot. Sess. Cas. 59, 2 B. W. C. C. 99, 102.

"It was certainly not within the contemplation of the parties when the appellant was engaged that he should get upon a moving wagon to enable him to go home to his dinner, and it was found that in doing so his object was not to serve his employer; and this is just another way of saying that the act leading to the disablement of the appellant neither arose expressly nor by implication out of his employment."

And so in Collins *v.* Collins [13] Fitz Gibbon, L. J., says:

"I cannot understand how the occurrence could arise out of and in the course of a particular employment unless it was something the risk of which might have been contemplated by a reasonable person on entering the employment, as incidental to it."

And in McDaid *v.* Steel [14] Lord Kinnear says that an errand boy who chose to work a lift which it was not his business to operate, thereby exposed himself to new risks which were not within the contract of employment which he made with his master.

Except in the dissenting opinion of Lord Atkinson in Astley *v.* Evans & Co.,[15] no such explicit statement appears in any English cases, but the same idea pervades many of the recent English cases. The knowledge by the master of the existence of the conditions which bring about the accident is regarded as essential;[16] and the master's knowledge can only be essential as showing that the risk of injury from this cause was within his foresight.

The cases which discuss the question as to whether a risk is so far incidental to an employment that an injury therefrom is regarded as arising out of it, fall into three groups:

1. Where the workman's injury is due to the physical conditions under which, and the surroundings amidst which, the employment is being carried on, or to the nature and condition of the working place and "its furniture," including the tools and appliances used in his employer's business.

2. Where the injury is directly due to the acts of anyone, whether the sufferer himself or a fellow workman engaged in the performance of the master's business within or without the particular sphere of labor entrusted to him.

3. Where the injury is due to some force not arising out of the

[13] [1907] 2 I. R. 104, 108.
[14] 48 Scot. L. Rep. 765, 767 (1911).
[15] 4 B. W. C. C. 319, 328 (1911).
[16] See for instance Rowland *v.* Wright, [1909] 1 K. B. 963, 1 B. W. C. C. 192.

employment nor due to any operation thereof, the sole connection between the employment and the force being that the workman's employment brings him into contact with it.

Even in construing the Act of 1897, restricted as it was to ultra-hazardous businesses, the conception that the injury must be one which must arise from one of those extra hazards which give the employment its dangerous character, which as has been seen is the basis of the decision in Falconer *v.* London & Glasgow Engineering Co. was never carried to its legal conclusion. In fact, its sole effect seems to have been to require that the injury should arise from a risk incidental to the employment, that is, one capable of being perceived as constituting a danger to those engaged therein. This appears with peculiar distinctness in those cases which deal with the liability of the master for injuries caused by the condition of his premises, or its "necessary furniture," [17] or any other conditions which to his knowledge exist thereon.[18] In Blovelt *v.* Sawyer,[19] a servant employed in a factory was injured while at his dinner by the fall of a wall, part of his employer's premises. He came within the act because he was employed in a factory which, as defined in the Factory and Workmen's Shops Acts, includes only occupations in which machinery, steam, water, or other mechanical power is used. The wall which fell might have fallen upon him at any work, in any premises; the wall fell because it was a bad wall, not because it was a factory wall. Indeed, it seems to be universally accepted that the risk need not be one which is peculiar only to the class of employment enumerated in the act. Nor under the Act of 1906 need it be one to which workmen and servants in other employments or even the public generally are not exposed.[20] The physical conditions sur-

[17] In Rowland *v.* Wright, *supra*, Cozens-Hardy, M. R., says that "part of what may be called the necessary furniture of a stable is the stable cat." He goes on to express that nothing he has said "will lend itself to the conclusion that if the man had been walking along the street and the cat had bitten him the master would have been liable."

[18] In Rowland *v.* Wright, *supra*, Cozens-Hardy, M. R., distinguishes sharply between a stable cat which both the employer and servant knew was in the stable and "a strange cat."

[19] [1904] 1 K. B. 271, 6 W. C. C. 16.

[20] In Rowland *v.* Wright, *ante*, n. 16, the court says that the right of a stableman bitten by a stable cat "is the same as if the man had been an ordinary domestic servant whose duties took him into the presence of a cat." Indeed, it would seem that the risk of being bitten by domestic animals, such as cats and dogs, is not one to which servants as such are any more exposed than their masters and their families. The

rounding the servant while at work are consistently regarded as a part of the individuality of the employments there carried on; danger of this sort is always regarded as a risk incidental to the employment. So, too, it was not necessary that the injury caused by the operations of a business, whether conducted by the sufferer himself or by his fellow servant, should be of a sort not likely to occur in any but this sort of employment. Even under the Act of 1897 it was not necessary that it should result from any of those operations which, being peculiarly dangerous, have led to the employment being enumerated in the act. It is enough that the work which is being done and which is the cause of the injury should be done in the course and within the scope of the employment of him who is doing it whether by the sufferer or his fellow workmen.

If the injury is the direct result of something done by the sufferer in the course of his employment,[21] or "from the negligence of a fellow workman in the course of his employment," [22] it is consistently held to be within the act.

While the test is subjective, the master's knowledge being essential, he need have no actual reason to regard the servant's injury as reasonably probable. It is enough that the employer knows that there exists in the business the situation which gives rise to the accident. It is enough that he knows that there is a wall upon his premises, or that a cat is allowed to stay there, or that certain work is being done; it is not necessary that he should know the precise condition which exists; for instance, that he should know that the wall is in bad repair, or that the cat is vicious and fierce, or that the servant is careless and apt to be guilty of negligence. Nor is it necessary that he should be guilty of negligence in any way, that he should have been derelict in not having ascertained the condition of his premises and in not having repaired it, or that he should know the nature of his cat or servant. Nor, if he knows of the actual condition of affairs, is it necessary that it contain a threat of injury so great that the master should appre-

---

risk is common, if not to all humanity, at least to that very large part of it who live in houses where pets are kept.

[21] An injury arises out of the employment, says Cozens-Hardy, M. R., in Craske *v.* Wigan, [1909] 2 K. B. 635, 638, if the applicant can say, "The accident arose out of something I was doing in the course of my employment."

[22] Mathew, L. J., in Armitage *v.* L. & Y. Ry., [1902] 2 K. B. 179, 183.

ciate its occurrence as probable; it is enough that he knows of the existence of the situation,[23] — a situation which, since it exists upon his premises and in his business, is regarded as so far individual to it that the risk of injury from it is incidental to that business and to the employment of all those who work therein.

As has been seen, an injury caused to a servant by his own deliberate departure from his designated sphere and place of work, or by his adoption for his own purposes of a dangerous method of work, is held not to arise out of the employment but from new risks which he himself has added to it.

And from the first it has been held that the injuries sustained by a servant while himself engaged upon the actual work entrusted to him does not arise out of the employment if it be due to the acts of fellow servants who themselves are outside the course of employment and are acting for their own purposes and not in an honest though mistaken or excessive effort to further their master's interests. Not only must the injured servant be in the course of his employment, but the acts of the fellow servants must be done in the course of their employment and arise out of it in the sense that they must be done for the purpose of furthering the performance of the work entrusted to them. Acts causing injury by a fellow servant, done through sheer spite or malice,[24] or in a spirit of fun, or in the act of "larking," are held not to arise out of the employment.[25]

The cases do not clearly determine whether the risk of conduct on the part of a fellow servant, which, if that of the sufferer himself, would clearly put him outside the course of his employment and prevent his injury from arising thereout, is or is not *ipso facto* outside of the risks incidental to employment of those at work near him. All the cases have been cases of larking or other cases in

[23] "Neither the master nor the man expected the cat to bite, but his [the man's] duties took him into the place where the cat was." Rowland *v.* Wright, *ante*, n. 16.

[24] If the fellow servant's action is designed to further the work entrusted to him and is appropriate thereto, the fact that it is excessive and that there is bad blood between him and the sufferer does not defeat recovery. McIntyre *v.* Rodgers, 6 Fraser 176 (Scot. Ct. Sess., 1904).

[25] Falconer *v.* London & Glasgow Engineering Co., 3 Fraser 564 (Scot. Ct. Sess., 1901); Armitage *v.* L. & Y. Ry., [1902] 2 K. B. 278, 4 W. C. C. 5; Fitzgerald *v.* Clarke & Sons, [1908] 2 K. B. 799; Baird *v.* Burley, [1908] Scot. Sess. Cas. 545, 1 B. W. C. C. 7; Wilson *v.* Laing, 46 Scot. L. Rep. 843, 2 B. W. C. C. 118 (Ct. Sess., 1909) (servant struck in the eye by a ball thrown in play by a fellow domestic).

which the fellow servant's act was directed against the sufferer, though perhaps not with any intention of injuring him. No case has held that the risk of injury, from a fellow servant temporarily "quitting his employment" [26] by doing for the moment something solely for his own convenience or pleasure, thereby increasing the risk to his fellows as well as to himself, is or is not a risk incidental to the employment of a fellow workman injured thereby. Yet such situations are apt to occur at any time. The instance given by Lord Moncreiff, dissenting in Falconer's case, of a miner deliberately opening his safety lamp for the purpose of lighting his pipe, would fulfil all the conditions necessary to bar such miner if himself injured. No case deals with this or any similar situation, nor does any case decide whether the risk of injury from a workman's choice for his own purposes of an unnecessarily dangerous way of doing his appointed work, which would undoubtedly bar him from compensation if injured, is or is not a risk incidental to the employment of his fellow workmen. The cases do not carry the master's exemption much, if any, further than the statement of Cozens-Hardy, L. J., in the first English case of this sort,[27] to the effect that "an accident caused by the tortious act of a fellow workman having no relation whatever to his employment, cannot be said to arise out of the employment."

On the other hand, it is held that the risk of injury by the tortious acts of third parties, strangers to the business, is a risk incidental to the employment if experience has shown that its nature,[28] or the nature of the service required by the employee on some particular occasion,[29] is such that it is reasonably probable that the servant will be exposed to such tortious interference. But the servant's exposure must be reasonably probable, it is not enough

[26] See Loreburn, L. C., in Reed *v.* G. W. Ry., *ante*, 25 HARV. L. REV. 420, n. 55.

[27] Armitage *v.* L. & Y. Ry., [1902] 2 K. B. 178, 4 W. C. C. 5, *ante*, n. 6.

[28] In Anderson *v.* Balfour, 44 Ir. L. T. 168, 3 B. W. C. C. 588 (C. A. Ir., 1910), the risk of injury from assault by poachers was held to be incidental to the complainant's employment as a gamekeeper. In Challis *v.* L. & S. W. Ry., [1905] 2 K. B. 154, 7 W. C. C. 23, it was held that the risk of injury by stones thrown by mischievous boys at an engineer was, in view of the known tendency of boys to throw stones at engines, a risk incidental to the employment of an engine driver.

[29] In Nesbit *v.* Rayne & Burn, [1910] 2 K. B. 689, 3 W. C. C. 507, it was held that the risk of being robbed and murdered was incidental to the employment of the servant who was sent by rail with a large sum of money, for the payment of wages of miners, though his general employment was the usually safe one of clerk.

that he may possibly be subjected to such danger.[30] The first case,[31] which arose under the Act of 1897, was one in which the tortious act was directed against the property of the employer and incidentally injured the employee who was in charge of it. The later cases,[32] decided under the Act of 1906, allowed compensation for injuries by tortious acts directed against the servant himself and intended to injure him as an employee, and because of the employment and not because of any animosity personal to him as an individual.[33]

---

[30] In Murphy *v.* Berwick, 43 Ir. L. T. 126, 2 B. W. C. C. 103 (C. A., 1909), it was held that an injury received by a hotel cook in the kitchen during a struggle with a drunken guest who was trying to kiss her, did not result from a risk incidental to her employment. (Though it was suggested that it might be a risk incidental to the employment of a barmaid.) "No case," says Walker, L. C., " has been cited in which an employer has been held liable for the tortious acts of third parties, where such tortious act was not a risk reasonably to be contemplated by the employee in undertaking the employment." Similar language is used in Collins *v.* Collins, [1907] 2 I. R. 104, in which it was held that the risk of being wounded in an affray in which the servant engaged for the protection of his master was not incidental to his employment of sewage work. It would, however, seem that since it is not necessary that the risk should be incidental to the general employment, if it is one to which the particular service on which the employee is engaged tends reasonably to subject him, this case therefore can only be supported on the ground that the servant was not justified in leaving the general field of his labor and undertaking the protection of his master's person. (See *ante*, 25 HARV. L. REV. 413, n. 43.) It would seem that if the master asked or permitted the claimant to interfere in his behalf — the matter left in doubt by the facts reported — or if the master's peril constituted an emergency which justified the servant in departing from his usual sphere of employment and going to his master's aid, while the risk was not within his contemplation when he entered upon his general employment, it was one to which his particular service obviously tended to expose him.

[31] Challis *v.* L. & S. W. Ry., [1905] 2 K. B. 154, 7 W. C. C. 23.

[32] Nesbit *v.* Rayne & Burn, [1910] 2 K. B. 689, 3 W. C. C. 507; Anderson *v.* Balfour, 44 Ir. L. T. 168, 3 B. W. C. C. 588 (C. A. Ir., 1910).

[33] In Murray *v.* Denholm & Co., 48 Scot. L. Rep. 896 (Ct. Sess., 1911), in which a workman, who remained loyal to his master and continued at work during a strike, was wounded by a mob of strikers who entered the shop for the purpose of closing it, recovery was denied, but principally upon the ground, in which all of the judges concurred, that the injury being intended could not be regarded as an accident. Of the judges, however, discussing the question as to whether, had it been an accident, it has arisen out of the employment, two of the three held that it would not have arisen out of the employment, the third expresses his doubts upon the subject. It would seem that under the English cases, of which the Scottish judges expressed their disapproval, recovery should have been allowed. Experience shows that workmen continuing work during a strike are peculiarly exposed to the risk of violence at the hands of the strikers; to hold the master liable in such case would not make him liable for any assault made upon the workman on his way home or when he had arrived there, because in such case, his employment having terminated when he left the master's

Much is to be said for an interpretation of the Act of 1897, restricted as it is to ultra-hazardous employments, which would deny compensation for injuries received from the tortious acts of both fellow workmen and strangers. But even in such an act there seems no good reason for distinguishing between these two sorts of tortious acts, unless an employment is classified as ultra-hazardous because of its tendency to provoke tortious violence against those employed therein. The employment of policemen might well be so regarded, because those employed therein are well known to be subject to assaults upon them, not as men but as policemen. But no one of the employments enumerated in the Act of 1897 is included therein because of such special peril.

In construing the Act of 1906, which is applicable to all businesses though not peculiarly dangerous, there seems no reason for making the deliberate wrongfulness as distinguished from the mere negligence of a fellow servant's acts or the object for which it is done, whether in furtherance of the master's business or for the servant's own amusement, of itself the decisive factor. Still less does it seem proper to distinguish between the tortious acts of fellow servants and of strangers. Under such an act the rule that injuries to arise out of the employment must result from risks incidental to it ceases to have relation to the peculiar perils of the employment, which, by rendering it peculiarly dangerous, leads to its inclusion in the act. What risks are incidental depends upon the foresight of the parties at the time the general employment began or the particular work is assigned the employee. The test should be, therefore, whether the acts which cause the injury are of the sort which experience should have led the parties to have actually foreseen, and should not be made to depend upon the object or character of the act, or of the status or position of the person guilty of it, except in so far as its object, or character, or the position of the person doing it, tends in fact to make its occurrence probable or improbable.

If the foresight of the parties is the proper test, it seems certain that no hard and fast distinction should be drawn between the tortious acts of third parties and of a fellow workman.[34] While

premises, his injury while it might arise out of his employment would not be received in the course of it.

[34] In Murray *v.* Denholm & Co., *supra*, Lord Salvesen says that if the workman cannot recover compensation from his employer for injury deliberately inflicted by his

many employments do from their nature tend to subject the servant to risk of violence from outsiders, yet in many instances the conditions of the employment, the known character of the working forces, are such that nothing is better known than that those employed therein will be subject to grave dangers by the horse play and deliberate misconduct of their fellow servants, and by their deliberate choice of methods and places of work, for their own convenience and in disobedience of orders, which threatens serious injury not only to themselves but to their fellows. One of the most usual forms of serious and wilful misconduct which under both acts is a total or a partial bar to compensation is this very thing; it would seem that so prevalent and frequent a practice could hardly be regarded as so abnormal as to be outside the contemplation of the parties as a thing likely to increase the risks of the employment.

The most difficult questions arise where a workman's injury is due to a cause not itself connected with the employer's business nor created by it, but which is one outside the business, into contact with which he is brought in the course of his employment. The cases are in hopeless confusion. It seems impossible to deduce from them any general principle or definite test by which it can be determined whether the risk from such a source is to be regarded as incidental to the employment, and so whether an injury due to it is to be held to arise out of the employment. One of the tests most usually given is whether it is one of "the ordinary dangers to which the nature of the workman's employment exposed him," [35] "a risk to which the workman is exposed by the nature of the employment." [36] Yet, under the authorities, this appears to be too broad. It is constantly said that "there must be something appreciably and substantially beyond the ordinary and normal risk which people ordinarily run and which is a necessary concomitant of the occupation the man is engaged in." [37]

fellow workmen, still more is this so where he "is injured by a third party over whom the employer has no control and who has entered his premises without his consent." At p. 905.

[35] The Lord President (Dunedin) in McNeice *v.* Singer Co., [1910–1911] Scot. Sess. Cas. 12, 48 Scot. L. Rep. 15, 4 B. W. C. C. 351, and in M'Laren *v.* Caledonian Ry., 48 Scot. L. Rep. 885, 887 (Ct. Sess., 1911).

[36] Lord Kinnear in M'Lauchlan *v.* Anderson, [1911] Scot. Sess. Cas. 529, 48 Scot. L. Rep. 349, 351, 4 B. W. C. C. 376, 378.

[37] Collins, M. R., in Andrew *v.* Failsworth Industrial Society, Ltd., [1904] 2 K. B. 32, 35, quoting the County Court judge.

If the risk is one common to all humanity, it is not enough that his employment subjects him, in common with all humanity, to it. Such a risk is incidental to his existence as a human being, not to his employment. Yet it is impossible to distinguish broadly between dangers of a sort to which only workmen in a particular employment are subjected and dangers of the sort to which all men are exposed. In Pierce *v.* The Provident Clothing Co.,[38] Buckley, L. J., does draw this distinction: "An accident," he says, "arises out of the employment when it results from a risk incidental to the employment as distinguished from a risk common to all mankind." But in the next sentence he shows that even to him the nature of the danger affords no definite test, for he adds: "though the risk incidental to the employment may include a risk common to all mankind." It is not enough to bar recovery that the danger is one to which all are subject. The risk must be the same; if the workman's employment involves a greater exposure to the danger than that to which the ordinary person is subject,[39] the risk of such greater exposure may be one incidental to his business. It may be said that the cases exhibit the thought that the employment must peculiarly tend to subject one employed therein to the risk of injury from a danger common to all mankind. The employee must be "exposed by the nature of his employment to some peculiar danger." [40] But it still remains to define the peculiarity. The word necessarily involves a comparison. It remains to be seen with what persons or class of persons the comparison is to be made. It involves also the

---

[38] [1911] 1 K. B. 997, 1003.

[39] Collins, M. R., in Andrew *v.* Failsworth Industrial Society, Ltd., *supra*, says the question is, "was the man exposed to more than the normal risk, which everybody, so to speak, incurs at any time and in any place.

[40] Cozens-Hardy, M. R., in Craske *v.* Wigan, [1909] 2 K. B. 635, 637, 2 B. W. C. C. 35, 39, in which it was held that an injury to a lady's maid, due to her striking herself in the eye in the effort to ward off a cockchafer which flew through an open window into the room where she was working, did not arise out of the employment. "The risk was in no way incidental to the employment of a lady's maid. She was not placed by reason of the employment in a position of any special danger. The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity." The peculiarity need not be in the nature of the work itself, it may lie in the condition under which it is carried on. So in Chitty *v.* Nelson, 126 L. T. J. 172, 2 B. W. C. C. 496 (Stockton in Tees Co. Ct., 1908), it was held that the suffocation of a domestic servant in her room in a fire arose out of her employment, since the situation of her room and the lameness of the cook, her room-mate, rendered her escape peculiarly difficult.

idea that the risk must differ in extent or the degree of the exposure to the common danger; it remains to be seen in what this difference must consist, and whether it is possible to formulate any principles as to the character or the nature of the difference so as to afford a practical working guide to the determination of the existence or non-existence of liability.

Even a casual examination of the cases will show that it is impossible to formulate any definite test as to the amount of extra exposure, of peculiarly intimate contact, needed to make the risk one peculiar to the employment, or to determine with what greater frequency the risk must be encountered. In each case it appears to come down to what can hardly be called the opinion of the individual judge, for judicial opinion is primarily the result of reasoning based upon approximately definite principles.[41] It is rather the sentiment of the trial judge which controls, unless the sentiment of the majority of the appellate court conflicts with it. It seems impossible to find any real reason for the action of the courts in cases of this class. For example, it was held that a workman upon a scaffold ten feet high was peculiarly exposed to lightning,[42] but that a man forced by the urgency of his employer's need to remain against his protest at his work of road-mending in a violent storm, during which every one who could had sought shelter, was not exposed to any greater risk from lightning than anyone else within the area of the storm.[43] Yet it was as much the nature of the latter's employment which forced him to remain out of doors in the storm as it was the nature of the former's employment which took him upon the scaffold; and while a workman who is at work at an elevation is perhaps a slightly

[41] Lord Kyllachy says in Haley *v.* United Collieries, Ltd., [1907] Scot. Sess. Cas. 214, 44 Scot. L. Rep. 193, 195: "The question . . . whether the accident arose out of and occurred in the course of the employment . . . cannot be solved by reference to any formula or general principle, but must always depend upon the circumstances of each case." And see the protest of Lord Loreburn, L. C., in the course of argument in Kitchenham *v.* S. S. Johannesburg, [1911] A. C. 417, and Walters *v.* Staveley Coal & Iron Co., Ltd., 4 B. W. C. C. 303, 304 (1911), against the citation of prior decisions upon any but precisely identical facts.

[42] In Andrew *v.* Failsworth Industrial Society, Ltd., [1904] 2 K. B. 32.

[43] Kelly *v.* Kerry County Council, 42 Ir. L. T. 23, 1 B. W. C. C. 194 (C. A., Ir., 1908). Fletcher Moulton, L. J., dissenting in Warner *v.* Couchman, [1911] 1 K. B. 351, says, at p. 358: "This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers." One may be permitted to differ as to the equal probability of being struck by lightning while indoors and out.

better target for lightning than one working on the ground, it seems equally clear that a man runs a greater danger of being struck while out in the open than he does if under shelter. So, too, while it was held that the risk of sunstroke was incidental to the employment of one painting a ship in dry dock in the tropics,[44] it was held that the risk of having his hands frost-bitten was not incidental to the work of a sailor, required as such to pull upon frozen and icy ropes, because in Halifax, where the injury occurred, everyone who goes out in winter runs some risk of injury by the cold.[45] Yet while in the one case the danger of sunstroke is increased by the glare of the sun from the ship which was being painted, and so the painter was exposed to a greater risk than other residents in the tropics, it would seem equally certain that the danger which every resident of Halifax runs of having his hands frost-bitten was in the sailor's case greatly increased by the necessity of handling icy ropes.

Nor is the requirement that if the risk is not greater in degree the exposure to it must be more frequent, consistently applied. In Pierce *v.* The Provident Clothing Co.,[46] an employee, whose employment as a canvasser for subscriptions took him constantly about the streets of London, chose with his employer's knowledge to use a bicycle as a means of getting about; while riding his bicycle he collided with a tram car and was killed. It was held that the risk of injury from the traffic of the streets was one incidental to his employment. Yet not three months before the same court had held in Warner *v.* Couchman [47] that the risk of having his hands frost-bitten was not incidental to the employment of a baker's boy whose duty it was to deliver bread for his master and to collect payment therefor, because "there was nothing in the nature of his employment which exposed him to more than the ordinary risk of cold to which any person working in the open air was exposed on that day";[48] "the squire in his dog cart, the farmer in his gig, the butcher, the grocer traveling, the carters in their carts, were all in

[44] Morgan *v.* S. S. Zenaida, 25 T. L. R. 446, 2 B. W. C. C. 19 (C. A., 1909). See *accord* the very recent case of Davies *v.* Gillespie (C. A., Oct. 17, 1911), briefly reported in 105 L. T. 494.

[45] Karemaker *v.* S. S. "Corsican," 4 B. W. C. C. 295 (C. A., 1911).

[46] [1911] 1 K. B. 997, 4 B. W. C. C. 242.

[47] [1911] 1 K. B. 351, 4 B. W. C. C. 32.

[48] Cozens-Hardy, M. R., in Warner *v.* Couchman, [1911] 1 K. B. 351, 354.

just the same position of exposure." [49] No importance was attached to the fact that he had to take off his gloves in order to make change. "This," it was said, "though probably more convenient, was not necessary." [50] Yet in Pierce *v.* The Provident Clothing Co. the deceased's use of the bicycle, while no doubt convenient, was even less necessary for the proper discharge of his duties.

It is impossible to reconcile Warner *v.* Couchman with Pierce *v.* The Provident Clothing Co. on any other supposition than that of a purely arbitrary distinction drawn between the risks of dangers due to natural causes and the risk of the known dangers of civilized life. If Warner was not by reason of his employment as baker's boy exposed to the cold to any greater degree than any other person whose business or pleasure forced him abroad in the cold, neither was Pierce subjected in any greater degree to the perils of travel on the streets than was anyone of the multitude of people who were on that day riding bicycles for their business or their pleasure in the streets of London. Nor was the number of persons whose business or pleasure took them out into the cold on the day upon which Warner was injured any greater than, if as great as, the number of persons who were abroad in the streets of London on the day upon which Pierce was injured; nor was the frequency or duration of the exposure greater in the one case than the other.

Whether peculiar frequency of exposure is necessary to make the risk incidental to the employment is more than uncertain. In McNeice *v.* Singer Sewing Machine Co.[51] the Lord President (Dunedin), upon whose opinion Cozens-Hardy, M. R., largely rests his decision in Pierce's case, laid no stress whatever upon the fact that the complainant's employment, as salesman and collector, required him to be constantly in the street. "That many members of the public are exposed to the same danger" to him is not "the criterion." To him it was enough that the claimant "in the course of his employment is compelled to go into the streets," and so was exposed to the risk, not as a member of the public but because his employment required him on that particular occasion to subject himself to it. It is true that Cozens-Hardy, M. R., in Pierce's case alludes to the frequency with which the decedent by the

[49] Farwell, L. J., at p. 359.

[50] Cozens-Hardy, M. R., at p. 354.

[51] [1910–1911] Scot. Sess. Cas. 12, 48 Scot. L. Rep. 15, 4 B. W. C. C. 351.

nature of his employment was forced to encounter the perils of traffic;[52] and Buckley, L. J., intimates the same idea by his comparison of the risks of collision to which a railway guard and an ordinary traveler by rail are subject.[53] Yet Cozens-Hardy, M. R., himself gives as an instance of an accident, undoubtedly arising out of and in the course of the employment, the running down by a tram car of a house servant sent upon an errand; yet no one could suppose that the position of a house servant tended to expose him with any peculiar frequency to the risk of traffic in the public streets. In fact, if such accident arises out of the employment at all, it is because it occurs from a risk to which the particular service required does, on that particular occasion, in fact expose him in common with all persons who have occasion to be upon the street.[54]

In fact, in Warner's case the Court of Appeal compared the claimant's employment with that of other persons, and denied him recovery because the risks which he ran were not peculiar to his employment and to no other, or to only a few others, while in Pierce's case they, like the Court of Sessions in McNeice's case, properly refused to make such a comparison. It seems clearly erroneous to compare the claimant's employment with other employments.[55] "The law does not say 'arising out of his employment

[52] He says, at p. 999, that the deceased's "work" (as a canvasser) "necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public."

[53] At p. 1003. He draws the same comparison in Fitzgerald *v.* Clarke & Son, [1908] 2 K. B. 796, 800.

[54] Indeed Cozens-Hardy is contrasting the liability of a master whose house servant is injured by street traffic while on an errand with the non-liability of a master whose servant is similarly injured at the same spot on his night off on his way to amuse himself at "The Franco-British Exhibition." Yet surely the object of his journey does not in the least increase his risk; the sole distinguishing factor is that in the first case the particular service required of him compels him to face it.

[55] In the very recent case of Amys *v.* Barton, 105 L. T. 619 (C. A., Oct. 25, 1911), an engineer employed to run some machinery upon a farm died of blood poisoning caused by a slight wound in his leg. The only evidence as to its cause was what the deceased had himself said — that he had been stung by a wasp of which many had been seen about. This evidence was rejected, but the court held that even had it been admitted, his dependents could not have recovered compensation, because, as Cozens-Hardy, M. R., said, "His particular employment did not expose him to any peculiar risk, or any greater risk than anybody who was engaged in the most ordinary occupations on a farm or elsewhere in the country was exposed to." If he thereby meant

and out of that employment alone.' Other employments have nothing to do with the question." [56]

Even in an act confined to ultra-hazardous trades such a comparison would be inappropriate. Under such an act it might be proper to require that the risk should be one of those which give to the business its extra-hazardous character, but even so it would only be proper to compare the employment with other employments not enumerated in the act and to exclude all risks not peculiar to the businesses covered by the act. Still less is it appropriate in an act applicable to all employments. Were the act designed to protect work-people because as such they are exposed to peculiar perils, it might be proper to compare the risk with that run by persons having no business to do. Yet no such comparison is attempted in any case. Indeed, it would seem that the whole conception that the risk must be in any way peculiar to the particular business is utterly out of place in such an act as that of 1906. The workman is singled out for protection not because peculiarly apt to be injured, but because as a class workmen are regarded as peculiarly unable to take care of the loss resulting from injury without serious detriment to

to compare the particular employment of the engineer with other sorts of farm labor or with employments on other farms, and intended to intimate that the risk must be peculiar to the particular sort of farm labor entrusted to him and not one common to all sorts of labor upon that or other farms, or that it must be peculiar to the employment on that particular farm as distinguished from the risk commonly attached to farm work wherever done, he goes far beyond anything as yet decided. Probably he meant no more than that the risk must be one peculiar to farm labor and not common to all persons employed in the most ordinary occupations of any sort in the country, in which event the case goes no further than Warner *v.* Couchman or Craske *v.* Wigan, itself a case of injury by a common insect. The fact that the wasps were found upon the master's premises is not decisive, nor is his liability made to depend, as indicated in a brief report of the same case in 56 Sol. J. 27, upon the domicile of the wasp, upon whether it was a wasp resident or wasp errant. The distinction between this case and Rowland *v.* Wright is that the wasps were not brought upon the premises by the master nor maintained there to his knowledge as part of "the necessary furniture" of the farm, as was the stable cat in Rowland's case, but, on the contrary, were natural incidents of country life. It is intimated that if it had been shown that the engineer's death was due to a sting of a hibernating wasp which the noise of the engine had roused, the risk would have been peculiarly incidental to such farm work as his, and would differ from that of other farm laborers and country residents who during the hibernating season run little or no risk of wasp stings.

[56] Fletcher Moulton, L. J., dissenting in Warner *v.* Couchman, [1911] 1 K. B. 357. It is carefully pointed out by him in Pierce *v.* Provident Clothing & Supply Co., Ltd., that his dissent was not upon the principles laid down in Warner's case, but upon their application to the facts.

society, present and future. This incapacity is present whenever he is injured; it should be enough that in fact his employment has brought the injury upon him.

II.

Having examined the decisions of the British courts which have construed and applied the phrase "arising out of and in the course of employment," it remains to consider whether the results reached are such as to make it desirable to copy these words in whole or in part, verbatim or with modifications, into American legislation upon this subject.

As has been seen, there seems to be a substantial agreement that such acts should be so drawn as, in so far as it is possible, to prevent rather than to encourage litigation, and so to save the waste attendant thereon. In order that litigation shall be prevented, it is necessary that upon the happening of any given accident it should be as nearly as possible certain whether the victim is or is not entitled to compensation. In order to arrive at this certainty, two things are required: First, that the act can be so construed as to supply definite rules and principles by which a given state of facts, when proved to exist, can be determined to fall within or outside its operations. Such principles must be capable of being formulated in advance so that they may furnish an existing standard by which the rights of the parties under the act can be ascertained. Secondly, such rules and principles should regard as decisive only such facts as are capable of definite and certain proof by witnesses. Every act must be applied to the facts of each particular case; it is impossible to draw any act so as to be automatically applicable. Some facts must always be proved, and conflict of evidence is possible in the proof of even the simplest facts. But if even approximate certainty is to be attained, the act should be as far as possible so framed as to make decisive only those external and physical facts which are capable of actual perception by witnesses, and as to which, therefore, dispute can only arise from flat perjury or from an honest difference in the perception of the facts by different witnesses. Every effort should be made to exclude as decisive of the right of compensation those so-called issues of fact which are in reality matters of inference from physical facts proven to exist. Unless the situation is very simple,

so that the inference to be drawn therefrom is obvious or is so usual that a particular inference has come to be regarded as the legally proper one to draw, there is always room for great uncertainty. It is hardly right to call these "questions of fact"; they are rather matters of opinion as to the effect of facts and in their nature are subject to the uncertainties inherent in all matters of opinion; they can only be finally determined by the decision of whatever body it may be whose province it is to draw the final inferences.

As has been seen, such general principles as have been formulated for the application of the phrase "arising out of and in the course of the employment" are at best vague and indefinite save where they are purely arbitrary. Indeed, after years of litigation, there is even grave doubt as to whether any general principles do exist. In Haley *v.* United Collieries,[57] Lord Killachy says that the question as to whether the accident arises out of and occurs in the course of employment "cannot be solved by reference to any formula or general principle, but must always depend upon the circumstances of each case," and Lord Loreburn, in several recent cases,[58] has protested against the citation of any case as authority unless decided upon facts practically identical with those in hand. If the phrase requires definition as well as application in each case arising under circumstances not previously litigated, it is indeed difficult to see how litigation is prevented rather than encouraged by its use. Neither the master nor the servant can know whether he is entitled to compensation or liable therefor until the opinion of the highest court is had upon the case.

It would seem, however, that these eminent judges are rather pessimistic. Certain general principles seem to have been evolved, or at least to be in the process of evolution, many of them vague and indefinite, some of them arbitrary, and most of them depending not upon the proof of external facts but upon some inference to be drawn therefrom, generally an inference as to the state of mind of one or the other of the parties. For instance, it is finally established that the workman's employment begins when he enters upon the premises upon which the employer conducts his business, and terminates when he leaves it.[59] This, while perhaps arbitrary, has

[57] Haley *v.* United Collieries, Ltd., [1906–1907] Scot. Sess. Cas. 214, 216.

[58] See note 41, *ante*.

[59] It is agreed that the right to compensation under workmen's compensation acts

the merit of certainty both in the definiteness of the principle announced and in that the only fact necessary to be proved is the purely physical and external one of the place of injury; but the certainty extends only to the exclusion of the employee from the benefit of the act by the fact that the injury occurred outside the premises. His right to recover for injuries received upon the premises is made to depend upon the reasonableness of his presence at the place of injury or upon the propriety of his choice of a particular path to or from his actual place of work, or of a place for doing things ancillary to his employment, and therefore depends upon the opinion of the judge upon an issue, the determination of which cannot with any confidence be predicted, in which the slightest difference in the facts may lead to entirely different conclusions. So, too, the right of a servant to recover for injuries received while doing work of a sort not specifically entrusted to him depends upon questions solely of opinion. For one thing, upon whether the nature of his employment is one which permits him a reasonable range of deviation from the field of his appointed labor. This question, except in an extreme case, is evidently one in regard to which reasonable persons may reasonably differ. Then, again, the extent of the deviation may well be decisive; this is a mere question of degree which admits of an infinite variety of opinion as to the precise point at which the task which the workman assumes becomes generically different to that set him. But even this does not exhaust the list of doubtful questions upon which his right may depend. He is permitted an almost unlimited deviation if the preservation of his master's property requires it, and whether such an emergency has arisen requiring such action is evidently a matter of opinion. Nor is this all. The existence of the emergency as a fact is not required; it is enough that the servant honestly believes that an emergency exists, thus introducing the most doubtful of all issues, the mental state of the sufferer.

should be an employee's exclusive remedy against his employer. As most if not all American jurisdictions hold that a servant is subject to the defenses of fellow service and assumption of risk, while upon his employer's premises, on his way to or from rest or while eating, resting, or otherwise satisfying the wants of nature though not actually engaged upon his appointed task, it seems advisable to provide expressly, in accordance with the construction put by British courts upon the words "in the course of employment," that a servant injured under such circumstances shall be entitled to compensation, at least if his injury results from the condition of the premises or is caused by the operation of the business conducted thereon.

All of these questions arise in determining whether a servant is in the course of his employment. And yet the construction put upon the phrase "arising out of the employment" is even more vague and indefinite, and the issues raised under such principles as have been formulated are even less susceptible of accurate proof, but are even more exclusively matters of opinion. The principal test is that most uncertain issue, the foresight of the parties at the time the employment begins. The subsidiary principles by which this test is to be applied are in many instances still a matter of dispute: for instance, it is hard to say whether there is any rule differentiating risks common to all mankind and risks peculiar to a particular sort of employment; and if there is any such distinction, it is even more doubtful whether there is or is not a purely arbitrary line drawn among risks general to all mankind between the risk of injury from purely natural forces and from dangers created by the activities of civilized mankind. Even where certainty of definition has been attained, the object or purpose of either the sufferer or the person who injures him, in doing what he does, is in very many instances made a decisive factor.[60] It seems, therefore, that it can be confidently said that, as construed by the English courts, the phrase is not one which tends to obtain either of the prime requirements of certainty of operation, the formulation of definite principles by which new states of fact can be seen to fall within or without the act, or the elimination of those so-called issues of fact, the result of which, depending as they do upon the inferences to be drawn from physical facts, can never be predicted with certainty.

There is likewise a substantial agreement that the employee's right to compensation and the employer's liability therefor, should not be dependent upon the moral or social guilt or innocence, the care or negligence, of either of them. The purpose is not to punish wrongdoing or to reward merit, but to relieve a social condition found

[60] For example, it has been seen that a servant injured by adopting for his own purposes a particular means of doing his work not expressly authorized by his employer, cannot recover if he has adopted it for the purpose of furthering some private purpose of his own. Yet there is great confusion as to what constitutes a private purpose; there is no definite certainty whether or not the means selected must be one recognized as more dangerous than that prescribed by the master, or even were these points definitely certain, there would always remain the question as to the object of the servant in choosing the method of work, whether it was for his own purpose or in an honest though mistaken idea as to what is best for his master's interests.

in practice to be intolerable, by making the business bear, as part of its operating cost, a part at least of the loss which it causes to those engaged in its operations. Therefore no penalty should be placed upon wrongdoing unless there is reason to believe that thereby the number of accidents may be appreciably diminished. It is obvious, however, that no man should be allowed to exploit the act by intentionally bringing injury upon himself in order to gain a benefit under it.

It has been seen, that while the English cases allow recovery for injuries which a workman sustains by reason of his mere negligence or stupidity, there has existed from the first a tendency, which has become more and more marked in the later cases, to hold that his injuries are either not received in the course of his employment or do not arise out of it, if they are due to his deliberate and selfish disregard of his master's wishes and interests. Almost at the first it was held that while a servant is not denied recovery for injuries due to his mere negligence or stupidity, he might put himself outside the course of his employment by officiously undertaking a work other than that specifically entrusted to him; and while he might be permitted to deviate slightly from his established task, in an honest though mistaken effort to further his master's interests, and though he might do work entirely different from that set him, if necessary to preserve his master's property or financial interests, an injury received because of even a slight deviation for his own purposes, was regarded as sustained outside the course of his employment. And it has been seen that the later cases hold that a risk which a servant encounters by such conduct or by doing, for some private purpose of his own or to lighten his labor, his work in a way different from and more dangerous than that designated by his master or which is prohibited by the latter, is not a risk incidental to the employment, and that the resulting injuries do not arise out of it. His injury is held to arise by reason of his voluntary exposure of himself to a risk not incidental to his employment, but superadded by him for his own convenience. This conclusion is reached by regarding as risks incidental to the employment only those which are inherent in it when carried on in the way and manner which the master has directed.

Under either the earlier or the later view, the employee's right to compensation is made to depend upon his regard for his em-

ployer's will and interests. Phrase it as one will, the servant is given the right to recover if, and only if, he is obedient and faithful; while not deprived of compensation by mere inadvertent wrong or stupidity, he is denied compensation if he deliberately disobeys his employer's directions and officiously acts in defiance of his master's will as expressed in the latter's definition of his servant's duties.

In the last analysis the servant is barred from recovery because of his fault, a species of fault differing, it is true, from any recognized by the common law as a bar to an action of tort, but fault none the less. It differs from and is narrower than contributory negligence, for deliberate action for the employee's own purpose is required; it differs from and is narrower than voluntary assumption of risk, since it requires exposure to a risk not necessitated by the task set by the employer, but it partakes of the nature of each and may be called the assumption of a risk voluntarily and unnecessarily incurred by the servant for purposes of his own and not in the faithful and devoted service of his master.

It may well be that a master should be given full power to regulate his own business, and should be free from liability for injury due to a servant's unwillingness to conform to the system which his master has established, often for the very purpose of protecting his servants from injury. It may well be that deliberate disobedience of orders, especially those designed to protect the servant and his fellows from accident, should bar those injured thereby. If the workman is to be denied compensation because of his misconduct, such denial should be clearly expressed as an exception to the general principle, in some such provision as that found in the English Act of 1897, expressly refusing compensation for injuries attributable to the sufferer's "serious and wilful misconduct," or preferably by specifically enumerating the precise kinds of misconduct which shall bar the right to compensation.

Even if it is desired to refuse compensation to workmen guilty of serious and wilful misconduct, it would seem extremely unwise to adopt as a phrase defining the general nature of the injuries to be compensated words which have been construed by the only court which has yet interpreted them, so as to make even a slight disobedience of orders or a trivial disregard of the master's interests, falling far short of serious and wilful misconduct, a bar to compensa-

tion because the injury resulting therefrom is regarded as not arising out of the employment nor received in the course of it.

The trend of recent American legislation appears on the whole to be against such a limitation of compensation. Many of the more recent acts, enacted and proposed, expressly deny compensation only where the injury is intentionally self-inflicted, and in some cases where it is due to intoxication, deliberately rejecting serious and wilful misconduct as a bar to compensation. The omission of this phrase indicates an intention to regard fault on the part of the workman as utterly immaterial. It is, therefore, even more obviously unwise to adopt in such acts the phraseology of the English act.

There is no doubt something repugnant to all the ideas of one trained in the common law and used to administering its principles, in the thought of permitting a man, injured by his own flagrant misconduct, to obtain compensation from another innocent of all wrongdoing. It is worthy of note that it is only since the passage of the Act of 1906, which gave compensation for death and serious and permanent disablement, notwithstanding the serious and wilful misconduct of the sufferer, that the English courts have definitely construed the act so as to hold that injuries which the servant has brought upon himself by his disregard of his master's wishes and interests do not arise out of the employment. Indeed, this tendency first appears in cases under that act where the employee was injured by his serious and wilful misconduct, and where, under the Act of 1897, he or his dependents would have been barred thereby from compensation. There is every reason to believe that this same repugnance will operate upon American courts, and to expect that, in applying American acts giving compensation to employees even though guilty of serious and wilful misconduct, they will construe the language copied from the English act as it has been construed by the English courts, and will, like them, indirectly introduce a limitation of compensation deliberately rejected by the legislatures. There is certainly no excuse for legislators deluding themselves and the public by providing in one section that only injuries self-inflicted shall be denied compensation, and at the same time adopting, as descriptive of the general nature of the injuries to be compensated, words which, as they know or could readily ascertain, have already been construed in England, and in all probability will be construed in America, as denying com-

pensation for injuries resulting to workmen from misconduct on their part of a sort to which experience has shown workmen as a class to be notoriously prone.

But perhaps both the most fundamental objection, both in theory and in practice, to this phrase, as construed in the British cases, is that it makes the master's liability depend upon the foresight of himself and his servant as to the probability that the servant will be subjected to the risk of injury of the sort which he sustains. Such a conception, while appropriate to determine the extent of duties and rights created by a contract voluntarily entered into, or to determine whether an individual is guilty of wrongful disregard of the rights of others in not preventing harm to them by removing the cause thereof, has no proper place in an act designed to throw upon the business a part of the loss which it in fact causes to those engaged therein, irrespective of the negligence or care with which it is conducted. Even in an elective act the obligation to compensate is not wholly the creature of the consent of the employer. The election is to accept the compensation scheme as prescribed by the act, as an alternative to an increased liability in an action of tort or as an alternative to losing statutory rights already granted. The election is to accept or reject the scheme in its entirety. The nature of the scheme is dictated by the legislature, and the extent of the liability under it is determined by its will and not by the wishes of the parties. To make the foresight of the master the test is to carry into an act in which the fault of the master is absolutely immaterial a conception of cause, as including culpability, appropriate only to tort law in which the defendant must not only be the cause, but the guilty cause, of the plaintiff's harm.[61] Whether the master or the servant had or had not reason to expect injury of the sort suffered or from the cause which in fact produced it, is utterly immaterial in determining whether the business in fact

[61] The restriction of liability even in tort actions to those consequences which are or should have been foreseen, has no relation to the relation of the defendant's act or omission to the plaintiff's injury as cause and effect, but, on the contrary, has relation solely to the moral or social responsibility of the defendant. It is the product of the conception that no man should be forced to make good a harm which he has innocently caused. He is not relieved from liability because he has not caused the harm, but because, though he has caused it, public opinion as interpreted by the courts deems it unfair or unwise to transfer to him, being innocent, the loss which his act has in fact already brought upon the plaintiff.

caused the injury. This depends on the sequence of events and is wholly objective.

In dealing with the causal relation necessary between the employment and the injury, only three courses appear to be open. The first is to regard it as enough that the employment furnishes the occasion for the employee's injury, that the servant by reason of his service is in fact exposed on the occasion of his injury to the force which injures him, whether it be one originating in the business itself or be a force or condition of which the business is in no way the cause. It may be possible to suggest cases where the broad right to compensation is at least seemingly unjust to the master, but the only other logical and workably definite alternative is to give compensation only where the operations of the business or the condition of the plant or premises are the active and immediate cause of the injury. In such cases a greater injustice will be done to the employee. The third alternative is to leave the phrase as it stands, so making — if American courts follow the course of English decision, as they will in all probability do — the foresight of the parties the test and inviting the very difficulties and uncertainties which experience has shown to have resulted therefrom.

One would suppose it to be impossible to find a more uncertain question — one less susceptible of definite proof, the result of which is more difficult to predict — upon the solution of which legal rights could be made to depend than the effect of an infinite variety of circumstances upon the human mind, were it not that the test now discussed makes the right to compensation depend not upon what the parties do actually foresee, but upon what they ought to foresee, under circumstances not actually known but which ought to be known; it introduces that most uncertain factor, the ideal mind of the socially normal man, by whose foresight the rights and liabilities of the parties must be determined. Until, after years of litigation, there is built up an elaborate system of rules determining what under given circumstances must be regarded as foreseeable, the question must always depend upon the circumstances of each case and upon the opinions of the triers of fact thereon. In its nature it is mere matter of opinion in every situation differing in the slightest degree from those already litigated; in practice, experience in those jurisdictions in which this test has been adopted to determine the existence or extent of liability in an action of negligence

has shown it to lead to the very uncertainty and consequent litigation which it is the object of workmen's compensation acts to prevent.

It seems evident that the adoption of the phrase "arising out of and in the course of the employment" is not calculated to secure certainty in the application of such acts, and so to prevent litigation or to eliminate fault on the part of the parties as a factor decisive of liability. Of the two phrases, "in the course of employment" has caused less uncertainty and has attached less importance to the fault of the workman, though even here the results obtained in the application of it are far from satisfactory. It is in the construction and the application of the phrase "arising out of the employment" that the greatest dangers exist. It is, therefore, a matter of congratulation that, in some at least of the American acts, this phrase has been omitted.

It would be presumptuous to attempt to formulate any alternative phraseology. What phraseology should be used must depend upon the nature and the extent of the right to compensation which each legislature may determine to grant. Whatever scheme be adopted, it would be altogether better, in view of the very unfortunate results attained in Great Britain, not to use either phrase, but to select some other words appropriate to accomplish the object in view, using the language of the English act as indicating what to avoid rather than what to copy. No satisfactory result can, the writer is convinced, be accomplished by copying the words of the English act and attempting to avoid the effect of the construction judicially put upon them by qualifications, explanations, or further definition, though even this is better than a blind acceptance of them, time-dishonored as they are.

The writer is not blind to the fact that a satisfactory substitute for the phrase criticized is difficult to draft, and realizes fully how much easier it is to criticize than to construct. The present article is meant solely to direct the attention of future legislators to the dangers that lurk in the blind assumption that since the English act has been in force for some years unamended, therefore it has worked satisfactorily and can be safely copied, and in the hope that with this plainly in view a more satisfactory phraseology can be found. There has been no lack of legal ability on the part of

those who have drawn the acts already in force, and no doubt the problem would now be satisfactorily solved had not the question of the constitutionality of the whole scheme absorbed practically their entire attention to the exclusion of mere matters of draftsmanship.

Francis H. Bohlen.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL.